UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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NEXT MILLENNIUM REALTY, L.L.C. and
101 FROST STREET ASSOCIATES,

Plaintiffs,

-against-

ADCHEM CORP., LINCOLN PROCESSING CORP., NORTHERN STATE REALTY CORP., NORTHERN STATE REALTY CO., and PUFAHL REALTY CORP.,

Defendants.
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ADCHEM CORP., LINCOLN PROCESSING CORP., NORTHERN STATE REALTY CORP., NORTHERN STATE REALTY CO., and PUFAHL REALTY CORP.,

Third-Party Plaintiffs,

-against-

THE ESTATE OF JERRY SPIEGEL, and ALAN EIDLER, PAMELA SPIEGEL SANDERS, and LISE SPIEGELWILKS, as Executors of the Estate of Jerry Spiegel,

Third-Party Defendants.
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MEMORANDUM AND ORDER
CV 03-5985 (ARL)

LINDSAY, Magistrate Judge:

Plaintiffs Next Millennium Realty, L.L.C. and 101 Frost Street Associations ("Plaintiffs"), who are the current owners of 89 Frost Street ("89 Frost Street" or the "Site"), 101 Frost Street and 770 Main Street located in North Hempstead, New York (collectively, the "Frost Street Sites"), commenced this action against defendants Adchem Corp. ("Adchem"), Lincoln Processing Corp. ("Lincoln"), Northern State Realty Corp. ("NSR Corp."), Northern State Realty Co. ("NSR Co.") and Pufahl Realty Corp. ("Pufahl Realty") (collectively "Defendants") pursuant

to the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq. ("CERCLA"). Essentially, Plaintiffs – who entered into three Consent Orders with the New York State Department of Environmental Conservation ("NYSDEC") agreeing to remediate the 89 Frost Street Site – seek to recover their on-site remedial costs from Defendants, alleging that Defendants exercised dominion and control over the 89 Frost Street Site from 1966 to 1977 through a number of closely controlled entities which operated as a single employer. Defendant Adchem is the only Defendant entity which is still operational. The parties have consented to the undersigned's jurisdiction pursuant to 28 U.S.C. § 636. Before the Court is Defendants' motion for partial summary judgment pursuant to Federal Rule of Civil Procedure ("Rule") 56 (1) to dismiss the "single enterprise" claims against Defendants; (2) to dismiss the common law nuisance claim; (3) to strike the jury demand; (4) to dismiss the CERCLA § 107 claims; and (5) to dismiss the complaint based on Plaintiffs' predecessor's release of liability. For the reasons set forth below, Defendants' motion is granted in part and denied in part.

BACKGROUND

This case arises from the release of perchloroethylene ("PCE") and other contaminants at 89 Frost Street. The factual background underlying this action is set forth in the Court's prior Memorandum and Order dated October 22, 2014, familiarity with which is presumed. The Court provides only those facts deemed pertinent to this motion. The following facts, drawn from the Third Amended Complaint and the parties' respective Continued Local Civil Rule 56.1 ("Rule 56.1") Statements of Facts, are undisputed, unless otherwise noted.

I. Frost Street Sites' Contamination and Litigation with NYSDEC

The Frost Street Sites are within the New Cassel Industrial Area ("NCIA"). Pls.' Rule 56.1 Counter Stmt. ¶ 161. In 1988, the entire NCIA was listed on the New York State Registry of Inactive Hazardous Waste Disposal Sites (the "Registry") as the source of volatile organic chemicals ("VOCs") contaminating groundwater. *Id.* ¶ 162. The Frost Street Sites were later removed from the Registry but re-listed in March 1996 after additional NYSDEC investigation revealed contamination with VOCs, including PCE. *Id.* ¶ 163. The Frost Street Sites have remained on the Registry since March 1996. *Id.* ¶ 166.

When the NCIA was first listed on the Registry, 89 Frost Street was owned by Jerry Spiegel ("Spiegel"), 101 Frost Street was owned by K.B. Co., and 770 Main Street was owned by Trusts for the Benefit of Pamela Spiegel and Lise Spiegel. *Id.* ¶ 164. Plaintiffs are the successors to these three prior owners. *Id.* ¶ 165. Spiegel Associates managed the Frost Street Sites on behalf of the prior owners and continues to do so on behalf of Plaintiffs. *Id.*

Plaintiffs or their predecessors were aware that the Frost Street Sites were listed on the Registry no later than June 10, 1996. *Id.* ¶ 167. By July 3, 1996, NYSDEC informed Plaintiffs or their predecessors that the Frost Street Sites were re-listed on the Registry and advised them of their potential liability as responsible parties for the contamination at 89 Frost Street. *Id.* ¶ 168. No later than July 3, 1996, Plaintiffs or their predecessors alleged that Defendant Adchem was responsible for the contamination at 89 Frost Street and demanded that Adchem "bear all costs and expenses in connection with" the contamination at the Site. *Id.* ¶ 169.

In 1996, Plaintiffs conducted environmental investigations of the Frost Street Sites and

petitioned NYSDEC to delist the Frost Street Sites from the Registry. *Id.* ¶ 170. NYSDEC denied the petitions. *Id.* In 1997, Spiegel Associates again petitioned NYSDEC to remove the Frost Street Sites from the Registry. *Id.* ¶ 171. The 1997 Petition separately identified defendants Lincoln and Adchem as "former tenants" of 89 Frost Street and stated that "there is no 'documented use' by these past tenants . . . of any chemical compounds related to the groundwater contamination in the NCIA," namely PCE or other VOCs. *Id.* at ¶ 172. Spiegel Associates requested Adchem's assistance in the preparation of the delisting petition for 89 Frost Street. *Id.* ¶ 173. In response, Adchem sent Spiegel Associates a copy of its response to the NYSDEC inquiries regarding the site, which stated that: (a) 89 Frost Street had been leased by Pufahl Realty in 1966 and occupied by Lincoln from 1996 to 1972; (b) Adchem's only connection to the site was that the Pufahl Brothers had offices there, and Adchem used "certain office facilities of [Lincoln]" at the site during Lincoln's occupancy there; (c) Pufahl Realty had changed its name to NSR Corp. and then NSR Co.; (d) NSR Co. had sublet the site to Marvex, which used PCE in its operations; and (e) the site was destroyed by fire in 1976, and Marvex's foreman was convicted of arson in connection with that fire. *Id.* ¶ 174.

The NYSDEC denied the 1997 petition to delist the Frost Street Sites. *Id.* ¶ 175. Thereafter, Plaintiffs' predecessors filed an Article 78 petition challenging the NYSDEC's denial of their delisting petition. *Id.* In their Article 78 petition, Plaintiffs' predecessors stated that "during its brief tenure as a property occupant [at 89 Frost Street], Adchem used the property as office space." *Id.* ¶ 176.

The Article 78 petition was dismissed on December 15, 1998. *Id.* ¶ 177. The state court concluded that NYSDEC had a rational basis for its finding that "a consequential amount of

hazardous waste had been disposed at the [Frost Street] Sites which '[p]resented a significant threat to the environment.'" *Id.* ¶ 177. NYSDEC conducted a Remedial Investigation/Feasibility Study ("RI/FS") at the Frost Street Sites between July and October 1998, and issued a report detailing the finding of the RI/FS in August 1999. *Id.* ¶ 178. Based on the results of the RI/FS, NYSDEC concluded that the groundwater at the Frost Street Sites "requires remediation due to contamination with [VOCs], PCE, TCE and 1,1,1,-TCA." *Id.* ¶ 179. Plaintiffs commented on the RI/FS in February 2000. *Id.* ¶ 180.

In March 2000, NYSDEC issued four Records of Decisions ("RODs") detailing the contamination (including PCE contamination) found at the Frost Street Sites and the remediation that would be required. *Id.* ¶ 181. The March 2000 RODs for the Frost Street Sites include NYSDEC's response to Plaintiffs' comments on the RI/FS: "The extremely high concentrations of PCE, which are driving the remedial requirements for the Frost Street [S]ites, clearly originate on the sites and are not from an upgradient source"; the "RI data clearly indicate that hazardous wastes were disposed at these sites"; and that NYSDEC would "not reconsider this issue, which has been conclusively resolved against the PRPs [Plaintiffs]." *Id.* ¶ 183. In January 2003, Plaintiffs executed three Consent Orders with NYSDEC that obligate Plaintiffs to remediate the Frost Street Sites. *Id.* ¶ 184.

II. The Instant Lawsuit and the Court's October 22, 2014 Decision

Plaintiffs initiated this lawsuit on November 24, 2003. The Third Amended Complaint asserts CERCLA liability against Defendants under two theories.[1] First, it alleges that

[1] The Third Amended Complaint also asserts a claim for common law nuisance, which is discussed *infra*.

Defendants have liability as "owners" of the 89 Frost Street Site. By Memorandum and Order dated October 22, 2014, the Court dismissed these claims, finding that Defendants were not liable as "owners" under CERCLA.

The second theory of CERCLA liability is "operator" liability based upon the operations allegedly conducted by certain Defendants at the 89 Frost Street facility between 1966 and 1972. There is no dispute that defendant Lincoln occupied and conducted operations at the 89 Frost Street Site during those years. Plaintiffs claim that Lincoln's operations released PCE, and Defendants dispute that contention.

The issue raised by the instant motion is whether all Defendants are liable for Lincoln's alleged operations under a single enterprise theory. In this regard, Plaintiffs allege that Defendants are liable as "operators" under CERCLA because they operated as a single enterprise under the dominion and control of three brothers, to wit, Charles Pufhal, Herman Pufhal and Joseph Pufhal (the"Pufhal Brothers"). *See* Third Am. Compl. ¶ 49 ("[E]ach Defendant[] either directly, in concert with other Defendants, or through alter ego entities, managed, directed, or conducted operations that resulted in the releases of hazardous substances at the facility."). With these considerations in mind, the Court turns to a discussion of the Defendant entities.

III. Identity of the Defendants

A. Pufhal Realty, NSR Corp. and NSR Co. - The "Lessee Defendants" – and their Subleases of 89 Frost Street

As set forth in detail in the Court's October 22, 2014 Memorandum and Order, on April 1, 1966, Spiegel, the then owner of the 89 Frost Street Site, entered into a lease with a purchase option with Defendant Pufahl Realty, a real estate management company, for the 89 Frost Street

Site. Oct. 22, 2014 Mem. and Order at 3. Pufhal Realty was a New York corporation formed in February of 1965. Pls.' Rule 56.1 Counter Stmt. ¶ 199. In 1969, Pufahl Realty changed its name to Northern State Realty Corp. (previously defined as "NSR Corp."). *Id.* Throughout its existence, NSR Corp. was in the business of leasing, owning and managing real estate. *Id.* ¶ 200. In 1973, NSR Corp. assigned all of its assets to NSR Co., a New York partnership formed in 1973, and dissolved. *Id.* ¶ 202. Throughout its existence, NSR Co. continued the business of NSR Corp. (leasing, owning, and managing real estate) as NSR Corp.'s successor. *Id.* ¶ 203. Defendants Pufahl Realty, NSR Corp. and NSR Co. are referred together as the "Lessee Defendants."

It is undisputed that the Lessee Defendants subleased the 89 Frost Street Site and never operated there themselves.[2] In this regard, from 1966-1973, the Lessee Defendants subleased 89 Frost Street to Lincoln, which used the Site as its principal place of business and main manufacturing plant. *Id.* ¶¶ 243, 247-48.

On May 22, 1973, NSR Co. subleased 89 Frost Street to 89 Frost Street Leasing Co. for a term to commence June 1, 1973. *Id.* ¶ 309. Pursuant to a rider to the sublease, NSR Co. sublet 89 Frost Street to Marvex Processing and Finishing Corporation ("Marvex"), a non-party dissolved corporation, from 1973-76. *Id.* Marvex released PCE at the site through Marvex's operation of a dry cleaning machine that utilized PCE as a solvent. *Id.* ¶ 310. In 1976, there was a fire at 89 Frost Street which destroyed the manufacturing area of the Site, including Marvex's

[2] This statement, as well as several that follow, are subject to Plaintiffs' allegations that the actions of one Defendant are attributable to all Defendants under a single enterprise theory.

dry cleaning machine, and further released PCE.[3] *Id.* The PCE released in the fire was released to the subsurface at 89 Frost Street via floor drains. *Id.* ¶ 312. It is undisputed that either through its manufacturing activity or following the fire, Marvex contributed PCE to the 89 Frost Street Site. Plaintiffs allege, however, that Marvex's activities were not the sole source of the PCE released at the site and contend that PCE was also released during Defendants' occupancy at the Site.

Throughout NSR Corp.'s existence, its shareholders, directors, and officers were the Pufahl Brothers, who each owned 1/3 of the shares of NSR Corp. *Id.* ¶ 213. Similarly, the Pufahl Brothers were the original partners of NSR Co. until the death of Herman Pufahl in 1995, when its partnership agreement was amended to include his widow, Marilyn Pufahl, as a partner. *Id.* ¶¶ 214-15.

B. Lincoln

Defendant Lincoln was incorporated in 1961. *Id.* ¶ 196. Lincoln subleased and operated at 89 Frost Street from 1966 to 1973. *Id.* ¶¶ 243, 248. Throughout its existence, Lincoln was in the business of commission bonding and laminating of fabrics, using a water-based adhesive to bond customers' cloth piece goods to an acetate or nylon tricot, or to urethane foam. Pls.' Rule 56.1 Counter Stmt. ¶ 198. Lincoln's products were used almost entirely in the production of outerwear – jackets, raincoats, suits, knit dresses and similar apparel. *Id.* ¶ 231. Lincoln's customers for its bonded fabrics were textile mills such as JP Stevens, Deering Milliken, Hargro, Woolmark, and Parker Wilder. *Id.* ¶ 232.

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[3] Marvex's dry cleaning machine was not present at 89 Frost Street during Lincoln's occupancy of the site but was installed approximately twelve to eighteen months after Marvex began operating there. Pls.' Rule 56.1 Counter Stmt. ¶ 311.

In 1963, Lincoln moved its operations from Manhattan to 625 Main Street in Westbury, New York. *Id.* ¶ 238. Lincoln leased 625 Main Street from Hauppauge Building Corporation on May 22, 1964 and assigned the lease to Pufahl Realty on March 2, 1965. *Id.* ¶¶ 240-41. From 1966 to 1972, Lincoln's principal place of business was 89 Frost Street, but Lincoln continued manufacturing operations in a portion of 625 Main Street until 1972 and used additional locations for fabric storage. *Id.* ¶¶ 242-48. In 1972, Lincoln moved to a site in Central Islip that it leased from NSR Corp. and transferred its manufacturing and administrative functions there by June 1973. *Id.* ¶ 251. Lincoln ceased operations at 89 Frost Street in 1972 or 1973, *id.*, and dissolved in approximately November 1977, *id.* ¶ 197.

From Lincoln's incorporation until its dissolution in 1977, some or all of the stock of Lincoln was evenly divided between the Pufahl Brothers. *Id.* ¶ 210. Between approximately 1961 and 1962, a portion of Lincoln's stock was owned by Louis Weissblatt. *Id.* ¶ 211. Louis Weissblatt's shares were purchased by the Pufahl Brothers in 1962. *Id.* Throughout its existence, Lincoln's directors and officers were the Pufahl Brothers. *Id.* ¶ 212.

C. Adchem

Adchem – the only Defendant entity which is still operational – was incorporated in February of 1965. *Id.* ¶ 194. Adchem manufactures adhesives and adhesive tapes. *Id.* ¶ 195. From Adchem's incorporation until Lincoln ceased operations, Adchem mixed and sold water-based adhesives to Lincoln for use in Lincoln's fabric bonding operations. *Id.* ¶ 316. Adchem manufactures tape by applying non-chlorinated solvent-based acrylic and rubber adhesives to a substrate, which then passes through a gas-fired oven; the exhaust air and volatilized solvent is recirculated through burners and returned to the coating oven to conserve

fuel. *Id.* ¶¶ 320-21. The parties dispute whether Adchem's operations used PCE, TCE or any other chlorinated solvent. *Id.* ¶ 322. Moreover, although the parties dispute whether adhesives were mixed at 89 Frost Street, it is undisputed that adhesive tape was never manufactured at 89 Frost Street. *Id.* ¶¶ 329-31.

According to Defendants, Adchem had no exclusivity agreement with Lincoln and attempted to sell water-based fabric adhesives to Lincoln's competitors from "time to time." Defs.' Rule 56.1 Stmt. ¶ 315. In response, Plaintiffs point out that there is no evidence that Lincoln was not Adchem's only customer or the majority of its sales. Pls.' Rule 56.1 Counter Stmt. ¶ 315. It is undisputed, however, that by 1966, Adchem also mixed and sold other types of adhesives to third parties outside the textile industry, including Pratt Paper, Angell Manufacturing, Ishmael Metal Decorating, Devon Tape, Mystic Tape, Tape Rite, Thursday Laminating, Prestige Label, and Acme Name Plate. *Id.* ¶ 319.

According to Defendants, from 1965 to the early 2000s, Adchem's principal place of business was 625 Main Street with operations at various locations, including 625 Main and 85 New York Avenue. Defs.' Rule 56.1 Stmt. ¶¶ 332-336. Defendants also maintain that Adchem never mixed adhesives and never conducted operations at 89 Frost Street. *Id.* ¶¶ 330-31. Plaintiffs, however, contend that Adchem conducted its corporate functions and mixed some chemicals at the 89 Frost Street Site. Pls.' Rule 56.1 Counter Stmt. ¶¶ 330-34.

According to Defendants, at the time of Adchem's incorporation, the record owners of all of the shares of Adchem were in the minor children of the Pufahl Brothers, and the Pufahl Brothers held the shares of Adchem in trust for their minor children pursuant to New York Personal Property Law Uniform Gifts to Minors Act. Defs.' Rule 56.1 Stmt. ¶ 218. According

to Plaintiffs, the common stock of Adchem was held by the Pufahl Brothers at all relevant times, and a separate class of stocks were created and held by the minor children of the Pufahl Brothers; thus, the Pufahl Brothers maintained control of the interests on behalf of their minor children. Pls.' Rule 56.1 Counter Stmt. ¶ 218. At Adchem's incorporation, its directors and officers were the Pufahl Brothers. *Id.* ¶ 219.

On March 31, 1967, the Certificate of Incorporation of Adchem was amended to change the stock structure of Adchem, pursuant to a vote of Adchem's shareholders. *Id.* ¶ 220. At that time, Adchem's stock was divided into two classes: preferred stock held in trust for the Puhahl Brothers' minor children and common stock that was purchased by the Pufahl Brothers in a recapitalization. *Id.* Thus, between 1967 to 1975, Adchem had two classes of stock. *Id.* ¶ 221. Adchem was the only Defendant that ever had stock owned by the Pufahl Brothers' minor children. *Id.* ¶ 222,

On or before January 7, 1971, John Pufahl (Joseph Pufahl's son) purchased 25% of the outstanding common stock of Adchem from the Pufahl Brothers. *Id.* ¶ 223. At the same time, John Pufahl was elected a director and officer of Adchem. *Id.* In 1975, Adchem redeemed and terminated the common stock held by Herman and Charles Pufahl and the preferred stock held by their children, and Charles and Herman Pufahl resigned as officers and directors of Adchem. *Id.* ¶ 224. Charles and Herman Pufahl were each paid $39,000 for their shares of Adchem common stock "as the result of arms-length negotiations," and the children of Charles and Herman Pufahl were each paid $1,000 for their Adchem stock. *Id.* ¶ 225. Immediately following the 1975 termination and redemption of Adchem stock owned by Charles and Herman Pufahl and their children and the resignation of Charles and Herman Pufahl as officers and

directors of Adchem, father and son Joseph and John Pufahl were the sole shareholders, officers, and directors of Adchem. *Id.* ¶ 226.

Robert Pufahl, the other son of Joseph Pufahl and brother of John Pufahl, became an officer and director of Adchem Corp. in approximately 1982. *Id.* ¶ 227. Joseph Pufahl remained an officer of Adchem until at least 2003. *Id.* ¶ 228. Since 1975, the ownership of Adchem's stock has changed several times, but it has always been held by members of the Pufahl family. *Id.* ¶ 229. Today, Adchem stock is held by John Pufahl and his brother, Robert Pufahl, the current officers of Adchem. *Id.*

IV. The Lessee Defendants' Properties

In addition to 89 Frost Street, the real estate leased and/or owned by NSR Corp. (and later NSR Co.) included the following locations: 625 Main Street, 85 New York Avenue, the Season Master Building, 141 East Suffolk Avenue and 710 Summa Avenue. *Id.* ¶ 277. Each property is discussed below.

1. 625 Main Street

Lincoln assigned the May 22, 1964 lease for 625 Main Street to Pufahl Realty on March 2, 1965. *Id.* ¶ 278. In June 1971, NSR Corp. subleased 625 Main Street to Adchem. *Id.* ¶ 280. NSR Corp. assigned the lease for 625 Main Street to NSR Co. in 1973, and the master lease for 625 Main Street was assigned by NSR Co. to Adchem in 1975. *Id.* ¶¶ 279, 281. Some time prior to the 1975 assignment, Adchem paid the rent for 625 Main Street directly to Spiegel, and after the assignment, Adchem continued to lease 625 Main Street directly from Spiegel. *Id.* ¶¶ 282, 284.

2. 85 New York Avenue

Pufahl Realty leased 85 New York Avenue from Jerry and Bertha Spiegel on February 17, 1965. *Id.* ¶ 285. In June 1971, NSR Corp. leased 85 New York Avenue to Adchem. *Id.* ¶ 286. NSR Corp. charged Adchem more in rent under the 1971 lease for 85 New York Avenue than Realty Corp. was required to pay Spiegel under the 1965 lease for the same property. *Id.* ¶ 287.

Pufahl Realty assigned the February 17, 1965 lease for 85 New York Avenue to NSR Co. in 1973. *Id.* at ¶ 288. In 1975, NSR Co. assigned the master lease for 85 New York Avenue to Adchem, and Adchem continued to lease the property directly from Jerry Spiegel after the assignment until it vacated that location. *Id.* ¶¶ 289-90.

3. The Season Master Building

Pufahl Realty leased some or all of the Season Master Building (717, 765 and 777 Main Street) from Jerry Spiegel in 1967. *Id.* ¶ 291. Beginning in 1967, Lincoln subleased a portion of the Season Master Building from Pufahl Realty. *Id.* ¶ 292. Between 1970 and 1972, the Season Master Building was occupied by third parties that were neither owned nor controlled by the Pufahl Brothers. *Id.* ¶ 293. Pursuant to an option contained in the lease for the building, NSR Corp. or NSR Co. purchased the Season Master Building in 1973, and NSR Co. sold the building in 1987. *Id.* ¶¶ 294-95. With respect to the proceeds of the sale of the Season Master Building, what did not go to taxes was split up between the three partners, i.e., the Pufahl Brothers, and Adchem did not receive any portion of the proceeds of the sale of the Season Master Building. *Id.* ¶ 296.

4. 141 East Suffolk

NSR Corp. acquired 141 East Suffolk Avenue in Central Islip, New York in 1969 and constructed a building on the premises. *Id.* ¶ 297. In 1973, NSR Corp. assigned 141 East Suffolk Avenue to NSR Co., and in 1977, Suffolk County acquired the property in an eminent domain proceeding. *Id.* ¶¶ 298-99.

5. 710 Summa Avenue

Pufahl Realty leased 710 Summa Avenue from Jerry Spiegel on January 18, 1966, and NSR Corp. (and later NSR Co.) leased the property to a number of tenants unrelated to the defendants. *Id.* ¶¶ 300-01. In 1974, NSR Co. purchased 710 Summa Avenue and sold the property in August 2000. *Id.* ¶¶ 302, 304. The proceeds were divided between the Pufhal Brothers; none of the sale proceeds went to Adchem or Lincoln. Defs.' Rule 56.1 Stmt. ¶ 304. This was the last real property owned by NSR Co., and upon its sale, NSR Co. dissolved by operation of its partnership agreement. Pls.' Rule 56.1 Counter Stmt. ¶ 305.

V. Lincoln's Dissolution

Lincoln's business contracted in the early 1970s, and at that time Lincoln began operating at a loss. *Id.* ¶ 264. Neither Adchem nor NSR Corp./NSR Co. shared any portion of Lincoln's operating losses. *Id.* ¶ 265. Lincoln significantly reduced its work force in the early 1970s, beginning no later than January 21, 1972. *Id.* ¶ 266. In 1972, Lincoln sold a significant amount of its machinery, which had previously been used in its fabric bonding operations, to non-parties. *Id.* ¶ 267. This machinery was sold at a loss. *Id.*

Beginning in approximately 1975 or 1976, Lincoln wound down its business operations and liquidated its remaining machinery and equipment – its only remaining assets – to

third parties. *Id.* ¶ 269. At that time, Lincoln had no assets other than its machinery and equipment. *Id.* With the exception of the transferral of life insurance policies, none of the other Defendants purchased or acquired any of Lincoln's machinery.[4] *Id.* ¶ 270. With regard to the life insurance policies, in 1975, pursuant to resolutions of its board of directors, Lincoln changed the beneficiary and owner of certain term life insurance policies on Joseph Pufahl to Adchem and other such policies on the Pufahl Brothers to NSR Co. *Id.* ¶ 271. Upon these changes, the recipient entities assumed payment of all premiums on the policies. *Id.* Neither Adchem nor NSR Co. received any proceeds from the life insurance policies because the policies lapsed before the death of any of the Pufahl Brothers. *Id.* ¶¶ 272-73.

Lincoln completed its dissolution and liquidation in approximately 1977, with a net operating loss. *Id.* ¶ 274. Lincoln's operating losses were not passed along to or shared with any other Defendant. Defs.' Rule 56.1 Stmt. ¶ 275.

VI. Relationship Between Defendants

A. Lines of Business and Public Identities

Lincoln, Adchem, and the Lessee Defendants were in separate lines of business. Defs.' Rule 56.1 Stmt. ¶ 344. Lincoln filed for registration of a service mark – Lincoln's logo, a stylized version of the letters "LP" – with the United States Patent and Trademark Office ("USPTO") on January 21, 1966, stating that the mark had first been used in commerce on November 1, 1963, for the service of "bonding of any fabric to any substrate." Pls.' Rule 56.1 Counter Stmt. ¶ 345. Lincoln's service mark was registered by the USPTO on October 17, 1967.

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[4] Plaintiffs also point out that Lincoln subleased the 89 Frost Street Site until 1972 and, thereafter, the lease interest in 89 Frost Street was sublet to Marvex for significant profit. Pls.' Rule 56.1 Counter Stmt. ¶ 270.

Id. ¶ 346. Lincoln used its service mark on its letterhead, in advertisements for its bonded fabrics, and on its delivery trucks. *Id.* ¶ 347.

Adchem filed for a design trademark on its logo, a stylized version of its name, with the USPTO on May 8, 1967, stating that the mark had first been used in interstate commerce on December 15, 1966, for adhesive goods. *Id.* ¶ 348. Adchem's trademark was officially registered by the USPTO on May 5, 1970. *Id.* ¶ 349. Adchem used this trademark in advertising matter and advertising material in various technical and trade publications, in technical bulletins issued by Adchem to industry, in stationary and labels, and on containers containing the products of Adchem as well as on Adchem's letterhead, although the length of time this trademark was used is disputed. *Id.* ¶ 350.

Each of the Defendants used its own letterhead, although again, the length of this practice is in dispute. *Id.* ¶ 351. In addition, Adchem, Lincoln, and NSR Co. had separate telephone numbers. *Id.* ¶ 352. Plaintiffs note that the central switchboard for Adchem was located at the 89 Frost Street Site, and calls relating to Adchem would come in to that switchboard and get directed back over to the 625 Main Street to be answered by the clerk or whoever was there. *Id.*

During Lincoln's occupancy of 89 Frost Street, Lincoln had a sign on 89 Frost identifying it as Lincoln's facility. *Id.* ¶ 353. Similarly, Adchem had a sign by the front door at 625 Main identifying 625 Main at Adchem's facility. *Id.* ¶ 354.

Adchem and Lincoln had separate customer order forms. *Id.* ¶ 355. Lincoln's order form had Lincoln's service mark on it; Adchem's order form was entitled "Adchem Corporation Order Form." *Id.* ¶ 356. Plaintiffs note, however, that prior to June of 1969, intercompany transactions between Adchem and Lincoln were done without any purchase orders. *Id.*

B. Adherence to Corporate Formalities

Each Defendant was separately incorporated and filed a separate certificate of incorporation with the Secretary of State, except for NSR Co., which was separately organized as a partnership and filed a Certificate of Doing Business as a Partnership with Nassau County. *Id.* ¶ 358. While Defendants maintain that each of the corporate Defendants (that is, all Defendants except NSR Co.) separately elected its own board of directors, Plaintiffs point out that each of the corporate Defendants shared the same board of directors. *Id.* ¶ 359.

According to Defendants, the corporate Defendants regularly held separate meetings of the shareholders and boards of directors, maintained separate minutes of those meetings as records of the separate corporations, and took separate votes. Defs.' Rule 56.1 Stmt. ¶¶ 360-61. According to Plaintiffs, many of these meeting were not called pursuant to a formal shareholders meeting notice and were not formal shareholder meetings. Pls.' Rule 56.1 Counter Stmt. ¶¶ 360-61.

Each of the corporate Defendants had separate corporate bylaws and its own separate corporate seal. *Id.* ¶¶ 362, 364. In addition, Defendants have proffered a 1967 shareholders agreement for Lincoln and a 1973 partnership agreement of NSR Co. Defs.' Rule 56.1 Stmt. ¶ 363.

C. Compensation Arrangements

Adchem paid out dividends to the minor children of the Pufahl Brothers while they were stockholders of Adchem. Pls.' Rule 56.1 Stmt. ¶ 365. Lincoln Processing did not pay dividends to its shareholders. *Id.* ¶ 366. The officers of Lincoln and Adchem drew separate salaries that were reflected in each company's separate financial statements. *Id.* ¶ 368.

NSR Co. made partnership distributions that were accounted for in its tax returns. *Id.* ¶ 367. NSR Corp. did not compensate its officers. *Id.* ¶ 369.

D. Defendants' Bank Accounts, Financial Records and Tax Filings

It is undisputed that all of the Defendants had separate bank accounts for certain periods; each Defendant filed taxes separately and paid the taxes due on its earnings out of its own account; and each Defendant had a separate federal tax identification number. *Id.* ¶¶ 378-80. In addition, Defendants assert that (1) each Defendant maintained separate accounting books and records, including accounts payable and receivable, and utilized the services of a third-party accountant, Phillip Garfield; (2) each Defendant maintained a separate balance sheet; (3) it was the practice of each Defendant to record any transactions between or among Defendants in the respective entities' accounts payable and/or receivable, if applicable; (4) the entries in Adchem's 1969-1971 account book treat transactions with Lincoln in a substantially identical manner as transactions with Adchem's other customers; (5) each Defendant had separate financial statements prepared for it at all times; (6) where consolidated financial statements were prepared for the Defendants, those statements were prepared from the separate financial statements of the individual Defendants; (7) after John Pufahl purchased 25% of Adchem's stock and became an Adchem officer in 1971, Adchem's financial statements could no longer be consolidated with the financial statements of Lincoln and NSR Corp./NSR Co., since consolidated statements could be made only for those entities that had the same directors, officers and stockholders; (8) each Defendant was separately capitalized; (9) the Pufahl Brothers treated each Defendant as a separate profit centers; (9) Defendants met their financial obligations using the income from their operations; and (10) each Defendant's income was sufficient to meet its ongoing financial

obligations, with the exception of Lincoln after Lincoln's business began to decline in the 1970s. Defs.' Rule 56.1 Stmt. ¶¶ 370-77, 381-83.

In response, Plaintiffs do not necessarily dispute the majority of Defendants' claims, which are supported by the evidence in the record. Instead, Plaintiffs note that (1) Defendants utilized combined financial reporting; (2) Defendants shared the same administrative office space and staff at 89 Frost Street; (3) bookkeeping, order entry, payroll, mail, central telephone and other office functions for each of the Defendants was conducted at the same administrative office at 89 Frost Street; (4) prior to June of 1969, intercompany transactions between Adchem and Lincoln were done without any purchase orders or receiving slips or records; (5) prior to 1969, transfers of chemicals between Adchem and Lincoln were done on a very informal basis, with no records of shipments or receivables; (6) there is insufficient evidence cited to conclusively prove that each Defendant was separately capitalized; and (7) the Pufahl Brothers set pricing and transferred funds between the Defendants to effectuate the meeting of the Defendants' financial obligations. Pls.' Rule 56.1 Counter Stmt. ¶¶ 370-77, 381-83.

E. Payrolls, Employees and Retirement Plans

It is undisputed that (1) income taxes and social security were withheld from the pay of the employees of Adchem and the employees of Lincoln; when those employees were paid, they received a pay stub reflecting the tax withholding; (2) other than the Pufahl Brothers, no one person was employed by both Lincoln and Adchem at the same time; (3) Adchem hired a small number of former employees of Lincoln; (4) Adchem and Lincoln maintained separate retirement plans for their employees: Lincoln's retirement plan was a profit sharing plan, while Adchem's retirement plan was a defined benefit pension plan; (5) Adchem and Lincoln's retirement plans

were approved by the IRS; and (6) NSR Corp. and NSR Co. did not have retirement plans. *Id.* ¶¶ 385-87, 390, 392-93.

Although Defendants maintain that Adchem and Lincoln had separate payrolls, Plaintiffs proffer that at least some payments to employees were made in cash and that employees were routinely transferred between entities at the will of the Pufhal Brothers. Pls.' Rule 56.1 Counter Stmt. ¶¶ 384, 386. According to Plaintiffs, when employees were traded back and forth between Lincoln and Adchem, the employees were paid with only one cash envelope, the method of payment did not change, and the person handing them the payment did not change. *Id.* ¶ 384.

Defendants submit that several former Lincoln employees testified that they were aware that the Pufahl Brothers owned and managed both Lincoln and Adchem as separate companies. Defs.' Rule 56.1 Stmt. ¶ 389. Plaintiffs note that there is conflicting testimony on this point. Some of the same employees and others testified that there was a significant overlap and that the Pufahl Brothers were their employers without reference to either Lincoln or Adchem. Pls.' Rule 56.1 Counter Stmt. ¶ 389.

F. Sales of Adhesives Between Defendants

As stated above, Adchem supplied water-based adhesive to Lincoln for use in Lincoln's fabric bonding operations from 1965 until Lincoln ceased operations. *Id.* ¶ 400. Adchem never sold any products to Lincoln other than water-based adhesives to be used in Lincoln's fabric bonding operations. *Id.* ¶ 406. Prior to Adchem's incorporation, Lincoln mixed its own adhesives for use in its fabric bonding process. *Id.* ¶ 401. Lincoln's adhesive formulas were initially developed by Charles and Joseph Pufahl in conjunction with Rohm & Haas (then known as Union Carbide). *Id.* Prior to Adchem's incorporation, Lincoln attempted to located an

outside supplier for its adhesives. *Id.* ¶ 402. Charles Pufahl testified that it "made good business sense" for Lincoln to turn over the adhesive mixing process to an outside company because it relieved Lincoln of the need to mix and receive chemicals, thus allowing Lincoln to focus on its primary business of bonding fabrics. *Id.* ¶ 403.

In 1968, Adchem installed a Nauta mixer at 85 New York Avenue that was capable of producing several thousand products of adhesive in a single batch. *Id.* ¶ 409. The Nauta mixer that Adchem used to mix adhesives for Lincoln was purchased by Adchem directly from the manufacturer and was never owned by Lincoln. *Id.* ¶ 410. Adchem also used the Nauta mixer to mix adhesives for Adchem's own use in tape manufacturing. *Id.* ¶ 411. Adchem continued to use the Nauta mixer until the late 1990s. *Id.*

When Adchem supplied adhesive to Lincoln for Lincoln's use at 89 Frost, Lincoln employees picked up the adhesive from the location where Adchem mixed it. *Id.* ¶ 414. Lincoln picked up adhesives from Adchem's mixing facility in more or less a continuous flow, as required on a daily basis, maybe more than once in a day. *Id.* ¶ 415.

According to Defendants, Adchem always charged Lincoln a mark-up over the cost of raw materials, labor and overhead for the adhesives purchased by Lincoln, and Adchem never provided adhesives to Lincoln without charging Lincoln, other than small samples of new adhesive formulations that would be provided on a trial basis. Defs.' Rule 56.1 Stmt. ¶ 408. The price of adhesive sold to Lincoln by Adchem was negotiated between the two companies based on price references from Adchem's competitors, including National Starch and Chemical, Northeastern Labs, and Clifton, at least one of which also sold adhesives to Lincoln's competitors. *Id.* ¶ 404. Adchem's price for adhesives sold to Lincoln was competitive with the

prices for adhesives offered by Adchem's competitors, *id.*, and Adchem profited from its adhesive sales to Lincoln, *id.* ¶ 407. Defendants also maintain that Adchem attempted to sell water-based adhesives for fabric bonding, similar to the adhesives Adchem sold to Lincoln, to other fabric bonders, i.e., Lincoln's competitors. *Id.* ¶ 405.

Plaintiffs contend, however, that negotiations between Lincoln and Adchem were not at arm's length; instead, the prices were set by John Pufahl and quality control at Adchem and were "negotiated" between Adchem and Lincoln by John Pufahl and Pufahl Brothers. Pls.' Rule 56.1 Counter Stmt. ¶ 404. Plaintiffs also dispute whether Adchem profited from its adhesive sales to Lincoln, *id.* ¶ 407, and point out that there is no evidence that Adchem ever sold the adhesive product to any customer not controlled by the Pufhal Brothers, *id.* ¶ 405. In this regard, relying on the 1969 Audit,[5] Plaintiffs assert that prior to June of 1969, intercompany transactions between Adchem and Lincoln were done without any purchase orders or receiving slips or records, and transfers of chemicals between Adchem and Lincoln were done on a very informal basis, with no records of shipments or receivables. *Id.* ¶ 373. In fact, it is undisputed that the 1969 Audit recommended that "regular receiving records and shipping records should be maintained or an intercompany transfer form be devised for such [Lincoln-Adchem intercompany] transactions" and that this recommendation was adopted no later than 1971. *Id.* ¶ 417.

[5] In 1969, a third party audit of intercompany procedures was conducted of Lincoln and its related companies.

G. Shared Office and Personnel Resources

1. Lincoln's Staff and the Pufhal Brothers Work for the Lessee Defendants

Because Pufahl Realty and NSR Corp. did not have employees of their own, their administrative functions were performed by Lincoln administrative staff. *Id.* ¶ 418. According to Defendants, Pufahl Realty and NSR Corp. compensated Lincoln for the use of its employees as demonstrated on Pufhal Realty's Statement of Operations which includes a line item for "Office Expense" for February 1965 to September 1966 and February 1966 to September 1967. Defs.' Rule 56.1 Stmt. ¶ 419. Plaintiffs, on the other hand, argue that there is no detail on what the "Office Expense" was for or to whom it was paid. Pls.' Rule 56.1 Counter Stmt. ¶ 419.

Similarly, after NSR Co. was formed, John Pufahl and the Pufahl Brothers performed administrative functions on behalf of NSR Co. since it did not have any staff of its own. *Id.* ¶ 420. John Pufahl was not compensated for his activity on behalf of NSR Co. *Id.* ¶ 421.

2. Lincoln's Staff Works for Adchem

It is undisputed that Adchem administrative staff never performed administrative work for Lincoln. *Id.* ¶ 427. It is further undisputed, however, that from approximately late 1966 until approximately 1971, Lincoln administrative staff located at 89 Frost Street performed some administrative tasks on behalf of Adchem, including bookkeeping, processing of payroll and invoices, some mail processing, and answering telephones.[6] *Id.* ¶ 422. The parties dispute the extent to the tasks and whether Lincoln was compensated. According to Defendants, Adchem

[6] Although this statement is undisputed, it contradicts Defendants' proffer in paragraph 426 that by 1967, Adchem administrative staff at 625 Main Street had taken over all of the administrative tasks that had previously been performed by Lincoln. Defs.' Rule 56.1 Stmt. ¶ 426.

compensated Lincoln for its use of Lincoln staff and office space through a recorded series of credits and debits. Defs.' Rule 56.1 Stmt. ¶ 423. In addition, during the time period when Lincoln administrative staff performed some administrative tasks on behalf of Adchem, Adchem also had its own office space and at least one administrative employee, located at 625 Main Street, who handled accounting and other administrative tasks for Adchem. *Id.* ¶ 424. Both during and after the time period when Lincoln administrative staff performed tasks on behalf of Adchem, Lincoln and Adchem also used the services of an outside accountant. That accountant kept separate accounting records for Adchem, Lincoln, and NSR Corp. *Id.* ¶ 425.

According to Plaintiffs, the evidence cited by Defendants is insufficient to prove that Adchem compensated Lincoln for its use of Lincoln staff and office space: although Adchem's Statement of Operations reveals nominal expenses for "office payroll" and "telephone," it does not reveal to whom the expenses were paid and the deposition testimony on this matter is unclear. Pls.' Rule 56.1 Counter Stmt. ¶ 423. In addition, Plaintiffs cite to John Pufhal's deposition testimony wherein he states that Adchem "hardly had any offices at 625 Main Street," *id.* ¶ 424, and that after 1967, payroll and other administrative tasks were still being conducted at the 89 Frost Street Site, *id.* ¶ 426.

3. Adchem's Use of Conference Room and Offices at 89 Frost

From approximately late 1966 until Adchem obtained its own conference room at 625 Main in approximately 1972 or 1973, Adchem occasionally utilized the conference room at 89 Frost for internal meetings for meetings with customers. *Id.* ¶ 428. From approximately late 1966 until 1972 or 1973, the Pufahl Brothers had offices at 89 Frost. *Id.* ¶ 429. The parties dispute whether Adchem compensated NSR Corp. and/or Lincoln for its usage of the 89 Frost

Street conference room and its proportional share of the Pufahl Brothers' offices at 89 Frost. *Id.* ¶ 430. It is undisputed that by no later than June 1973, none of the Pufahl Brothers maintained offices at 89 Frost and no Defendant used the conference room at 89 Frost. *Id.* ¶ 431.

H. Leasing and Subleasing of Operating Locations

After NSR Corp. was incorporated, Lincoln subleased the locations where it operated from NSR Corp. (and later from NSR Co). *Id.* ¶ 432. Similarly, Adchem subleased 625 Main and 85 New York Ave from NSR Corp. (and later NSR Co.) until 1975, at which time Adchem was assigned the leases for those locations. *Id.* ¶ 433. Each of the Lessee Defendants charged a percentage above the base lease price when it rented space to Lincoln and/or Adchem, allowing the Lessee Defendants to profit from their subleases with Lincoln and/or Adchem. *Id.* ¶ 434.

Beginning in approximately 1970 or 1971, NSR Corp. began to sublease some of its locations to non-Defendant entities that were neither owned nor controlled by the Pufahl Brothers because Lincoln's operations had contracted to the point where Lincoln no longer needed the amount of space it had previously occupied. *Id.* ¶ 436. NSR Co. invoiced Lincoln for rent in the same manner as it invoiced entities not owned by the Pufahls. *Id.* ¶ 437. Plaintiffs do not dispute this latter statement but do assert that there is no evidence that this was the practice at all relevant times. *Id.*

I. Accountant Allocation of Shared Expenses Between Defendants

According to Defendants, from approximately 1965 until approximately 1976, Defendants shared portions of certain expenses apart from rent, including administrative expenses, utilities, freight, and insurance. Defs.' Rule 56.1 Stmt. ¶ 438. Outside accountants determined each Defendants' respective share of such shared expenses, and each Defendant paid

its share and entered such payments on its books as accounts payable and receivable, as applicable. *Id.* Plaintiffs do not dispute that Defendants shared these expenses but dispute that they did so for the entire time stated. Plaintiffs also dispute that each Defendant paid its share, although Plaintiffs cite to no evidence in support of their contention. Pls.' Rule 56.1 Counter Stmt. ¶ 438.

DISCUSSION

I. Applicable Law and Legal Standards

A. Summary Judgment

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is genuine if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' A fact is material if it 'might affect the outcome of the suit under the governing law.'" *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In determining whether an issue is genuine, "[t]he inferences to be drawn from the underlying affidavits, exhibits, interrogatory answers, and depositions must be viewed in the light most favorable to the party opposing the motion," *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 202 (2d Cir. 1995) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)); *see Dickerson v. Napolitano*, 604 F.3d 732, 740 (2d Cir. 2010) (same).

Once the moving party has met its burden, "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)); *see also Wright v.*

Goord, 554 F.3d 255, 266 (2d Cir. 2009). The nonmoving party cannot survive summary judgment by casting mere "metaphysical doubt" upon the evidence produced by the moving party. *Matsushita*, 475 U.S. at 586. Summary judgment is appropriate when the moving party can show that "little or no evidence may be found in support of the nonmoving party's case." *Gallo v. Prudential Residential Servs., Ltd.*, 22 F.3d 1219, 1223-24 (2d Cir. 1994) (citations omitted). However, "the judge's role in reviewing a motion for summary judgment is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. "When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." *Gallo*, 22 F.3d at 1224.

B. CERCLA

"CERCLA is a comprehensive federal law governing the remediation of Sites contaminated with pollutants." *Consol. Edison Co. of N.Y. v. UGI Utils., Inc.,* 423 F.3d 90, 94 (2d Cir. 2005). CERCLA's "primary purposes are axiomatic: (1) to encourage the timely cleanup of hazardous waste Sites; and (2) to place the cost of that cleanup on those responsible for creating or maintaining the hazardous condition." *W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*. 559 F.3d 85, 88 (2d Cir. 2009) (internal quotation marks and citations omitted). "To effectuate these goals, CERCLA looks backward in time and imposes wide-ranging liability." *Marsh v. Rosenbloom,* 499 F.3d 165, 178 (2d Cir. 2007). Thus, absent the availability of one of CERCLA's affirmative defenses, "the statute imposes strict liability on owners and facility operators, on persons who arranged for the disposal or treatment of hazardous waste at the relevant site, and on persons who transported hazardous waste to the site," often collectively

referred to as potentially responsible parties.[7] *Price Trucking Corp. v. Norampac Indus., Inc.*, 748 F.3d 75, 79 (2d Cir. 2014) (citing 48 U.S.C. § 9607(a)(1)-(4)). CERCLA, however, "provide[s] property owners an avenue of reprieve; it allows them to seek reimbursement of their cleanup costs from others in the chain of title or from certain polluters – the so-called potentially responsible parties." *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.,* 596 F.3d 112, 120 (2d Cir. 2010). For purposes of the within motion for partial summary judgment, the relevant avenue of reprieve is 42 U.S.C. § 9607(a)(4)(A)-(B), which provides for cost recovery actions by private parties against potentially responsible parties. 42 U.S.C. § 9607(a).

Under CERCLA, a person is liable as a past "owner" or "operator" if he or she "at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." *Id.* § 9607(a)(2). The term "owner or operator" is unhelpfully defined "only by tautology . . . as 'any person owning or operating' a facility." *United States v. Bestfoods,* 524 U.S. 51, 56 (1998) (quoting 42 U.S.C. § 9601(20)(A)(ii)). "It is settled in this circuit that owner and operator liability should be treated separately." *Commander*

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[7]CERCLA defines four classes of persons as potentially responsible parties:

> (1) the owner and operator of a vessel or facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or Sites selected by such person from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

42 U.S.C. § 9607(a)(1)-(4).

Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 328 (2d Cir. 2000); *cf. Bestfoods,* 524 U.S. at 64 ("If the Act rested liability entirely on ownership of a polluting facility, this opinion might end here; but CERCLA liability may turn on operation as well as ownership").

"To make out a prima facie case for liability under the Act, a plaintiff must establish that: (1) the defendant is an 'owner' or is otherwise liable [e.g., as an operator] under 42 U.S.C. § 9607(a)(1)-(4); (2) the site is a 'facility' as defined by 42 U.S.C. § 9601(9); (3) there has been a release or threatened release of hazardous substances at the facility; (4) the plaintiff incurred costs responding to the release or the threat; and (5) the costs and response conform to the National Contingency Plan." *Price Tracking Corp.*, 748 F.3d at 79 -80 (citations omitted). For purposes of Defendants' motion for partial summary judgment, the central contested issue is whether the Defendants are "operators" within the meaning of 42 U.S.C. § 9607(a)(1) under a single enterprise theory.

II. Defendants' Motion for Partial Summary Judgment

A. Plaintiffs' Single Employer Claims Fail as a Matter of Law

As noted above, Plaintiffs seek to impose CERCLA liability against all Defendants based on the operations of Lincoln at the site under a single enterprise theory. Specifically, "Plaintiffs contend that the Pufhal Brothers as common owners and managers of all of the Defendants operated a single enterprise creating veil piercing liability for all the Defendants." DE 699 at 6.

"Veil piercing may be used to remove corporate distinctions among corporations where the corporations are being operated by their individual owner as a single 'corporate combine.'" *In re D'Alessio*, No. 8–08–72819, 2014 WL 201871, at *6 (Bankr. E.D.N.Y. Jan. 17, 2014) (quoting *Gartner v. Snyder*, 607 F.2d 582, 587-88 (2d Cir. 1979)); *see also D. Klein & Son, Inc. v. Good Decision, Inc.*, 147 F. App'x 195, 199 (2d Cir. 2005) (holding that piercing was

appropriate where two companies were "effectively operated by their common owners as a single company"); *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 139-40 (2d Cir. 1991) (addressing allegations that defendant corporations "were one whole entity"). However, "[i]t is fundamental that a parent is considered a legally separate entity from its subsidiary, and cannot be held liable for the subsidiary's actions based solely on its ownership of a controlling interest in the subsidiary." *N.Y. State Elec. and Gas Corp. v. FirstEnergy Corp.*, 766 F.3d 212, 224 (2d Cir. 2014) (citing *Bestfoods*, 524 U.S. at 61). "Under New York law, however, a parent can be held liable for the actions of a[n affiliate] where a plaintiff shows: (1) the parent corporation dominates the subsidiary in such a way as to make it a 'mere instrumentality' of the parent; (2) the parent company exploits its control to 'commit fraud or other wrong'; and (3) the plaintiff suffers an unjust loss or injury as a result of the fraud or wrong." *Id.* In CERCLA cases, the second prong requires establishing that "corporate domination caused the contamination at the Site." *Bedford Affiliates v. Sills*, 156 F.3d 416, 432 (2d Cir. 1998), *overruled on other grounds by W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 90 (2d Cir. 2009).

1. Domination

In considering whether a party has satisfied the "domination" prong, courts consider many factors, including:

> (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like[;]
>
> (2) inadequate capitalization[;]
>
> (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes[;]
>
> (4) overlap in ownership, officers, directors, and personnel[;]

> (5) common office space, address and telephone numbers of corporate entities[;]
>
> (6) the amount of business discretion displayed by the allegedly dominated corporation[;]
>
> (7) whether the related corporations deal with the dominated corporation at arms length[;]
>
> (8) whether the corporations are treated as independent profit centers[;]
>
> (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group[;] and
>
> (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.

N.Y. State Elec. and Gas Corp., 766 F.3d at 224 (quoting *Wm. Passalacqua Builders*, 933 F.2d at 139. Not every factor need be present and no one factor is dispositive. *Id.* at 225.

In applying these factors, "there is a presumption of separateness . . . which is entitled to substantial weight." *Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988). The complaining party must show actual domination and not just an "opportunity to exercise control." *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 69 (2d Cir. 1996); *see also Am. Protein Corp.*, 844 F.2d at 60 (existence of interlocking directorates between a parent and a subsidiary is a "commonplace circumstance of modern business [that] does not furnish such proof of control as will permit a court to pierce the corporate veil"). "Although the question of domination is generally one of fact, courts have granted motions to dismiss as well as motions for summary judgment in favor of defendant parent companies where there has been a lack of sufficient evidence to place the alter ego issue in dispute." *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1458 (2d Cir. 1995). With these principles in mind, the Court examines each factor in turn.

a. Corporate Formalities

Defendants proffer a litany of ways in which corporate formalities were preserved. For example, it is undisputed that Defendants maintained separate incorporations and organization; amendments thereto; bylaws; corporate seals; distributions; tax filings; stock and stock redemptions; IRS-approved retirement plans; and officer elections and resignations. It is further undisputed that the corporate Defendants held separate meetings and took separate votes on significant actions to be taken by that corporation at those respective meetings. In response, Plaintiffs cite to deposition testimony that shareholder and Board meetings of the Defendants were informal and were not called pursuant to formal notice. In addition, Plaintiffs argue that while there is some evidence of separate agreements, there is no evidence that all Defendants had shareholder and partnership agreements at all relevant times. Plaintiffs' "evidence" of minor deviations from perfect observance of corporate formalities is insufficient to eviscerate the presumption of corporate separateness. *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 18 (2d Cir. 1996) ("[W]ith respect to small, privately-held corporations, 'the trappings of sophisticated corporate life are rarely present,' and [courts] must avoid an over-rigid 'preoccupation with questions of structure, financial and accounting sophistication or dividend policy or history.'") (quoting *William Wrigley Jr. Co. v. Waters*, 890 F.2d 594, 601 (2d Cir.1989)). Accordingly, the Court finds that this factor weighs against a finding of alter ego liability.

b. Inadequate Capitalization

"Inadequate capitalization is integral to the veil-piercing analysis, particularly in the context of a closely-held corporation." *In re Adler*, 467 B.R. 279, 289 (Bankr. E.D.N.Y. 2012). "Typically, corporations which are undercapitalized in such a way as to ensure that entities doing

business with the corporation will have no way to recover damages against the corporation, will not receive the benefit of limited liability." *Id.*

The inadequate capitalization factor pertains to capitalization in light of the purposes for which the corporation was organized. *Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc.*, 255 F. Supp. 2d 134, 181 (W.D.N.Y. 2003); *see also Wm. Passalacqua Builders,* 933 F.2d at 142 (construction firm's undertaking multimillion dollar construction project despite capitalization of only $10 was evidence of insufficient capitalization). Here, Defendants' separate financials show that each Defendant was separately capitalized, and Plaintiffs present no evidence that such capitalization was inadequate. Instead, Plaintiffs assert that: (1) Defendants utilized combined financial reporting; (2) money flowed from Lincoln to Adchem in that Lincoln's staff replenished Adchem's petty cash fund and freight check book; and (3) the Pufhal Brothers set pricing and transferred funds between Defendants to effectuate the meeting of Defendants' financial obligations. None of Plaintiffs assertions supports a finding of inadequate capitalization.

As an initial matter, the evidence reflects that where consolidated financial statements were prepared for Defendants, those statements were derived from the separate balance sheets and income statements of each company and combined in accordance with generally accepted accounting principles. *See Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 121 n.3 (2d Cir. 1984) (noting that generally accepted accounting principles require parent corporations to consolidate financial statements if parent corporation owns more than 50 percent of subsidiary's stock); *McAnaney v. Astoria Fin. Corp.*, 665 F. Supp. 2d 132, 144-45 (E.D.N.Y. 2009) ("The facts which plaintiffs claim indicate excessive control and domination in the instant case – controlling ownership interest in subsidiaries, *reporting of consolidated results of such*

subsidiaries in public filings, and overlapping directors and officers between parent and subsidiary corporations – are commonplace as generally-accepted corporate form, and are insufficient without more, as a matter of law, to eviscerate the presumption of corporate separateness.") (emphasis added).

Next, to the extent Plaintiffs allege that money flowed from Lincoln to Adchem, Plaintiffs rely on the 1969 Audit which found that Adchem maintained a "small petty cash fund" for which all disbursements were receipted and that reimbursement was made by Lincoln staff "upon submission of vouchers as funds are required." DE 998-19 at AAOO6860. The Audit also found that Adchem had a freight check book for which replenishment was made by Lincoln's office manager. *Id.* There is no evidence, however, on how much money was replenished or whether the funds were replenished from Lincoln or Adchem's funds.

Lastly, Plaintiffs contend that Defendants "set" pricing based upon the fact that the price of adhesives sold to Lincoln by Adchem was negotiated between John Pufhal and the Pufhal Brothers. In this regard, Plaintiffs argue that "[a]rm's-length dealings are impossible in a situation as this, where the directors, officers and stockholders are the same three individuals for all the companies doing business with each other." DE 699 at 16. Plaintiffs are mistaken. The fact that both corporations were run by substantially the same individuals is not probative in and of itself of shell negotiations for corporate veil piercing purposes, and Plaintiffs' contention that "arm's-length dealings are impossible" under these circumstances is contrary to law. *See Bestfoods*, 524 U.S. at 69 (noting "well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership"). In sum, the Court has reviewed the record and Plaintiffs' arguments on this factor and finds that there is no evidence

that Defendants were inadequately capitalized. Thus, this factor weighs against piercing the corporate veil.

c. Personal Use of Corporate Funds

The Second Circuit has noted that in deciding whether to disregard the corporate form, "[t]he critical question is whether the corporation is a shell being used by the individual shareowners to advance their own purely personal rather than corporate ends." *Wm. Passalacqua*, 933 F.2d at 138 (citations and internal quotation marks omitted). Citing to the deposition testimony of Defendants' former attorney, Plaintiffs allege that the Pufhal Brothers borrowed money from Lincoln and/or Adchem and that it is not clear from the record whether records were kept or whether interest was paid. In fact, what this attorney testified to is that he believed that the Pufhal Brothers borrowed money from Lincoln – but not Adchem – under an arrangement available to all Lincoln employees where they would be charged interest if they did not pay the loan back within a certain time period. Defs.' Rule 56.1 Stmt. ¶¶ 398-399. The testimony cited by Plaintiffs does not demonstrate that the Pufhal Brothers improperly used corporate funds of the Defendants for personal use. Accordingly, this factor weighs against a finding of alter ego liability.

d. Overlap in Ownership, Officers, Directors and Personnel

In support of their position that all Defendants operated as a single enterprise and conducted operations at 89 Frost Street, Plaintiffs point to the fact that all Defendants had common ownership and management. However, as noted above, it is well-settled that these facts alone are insufficient to pierce the corporate veil. *De Jesus*, 87 F.3d at 69; *see also Greene v. Long Island R.R. Co.*, 280 F.3d 224, 235 (2d Cir. 2002) ("[C]orporate ownership of a subsidiary and overlapping offices and directorates are not, without more, sufficient to impose liability on

the parent for conduct of the subsidiary [.]"). However, common ownership coupled with other factors may be probative of alter ego; thus, the Court continues its analysis.

Plaintiffs also contend that employees were transferred back and forth between entities at the will of the Pufhal Brothers. Plaintiffs rely on, *inter alia*, the deposition testimony and affidavit of Obadiah Goodman, who worked as a foreman at both 625 Main Street and 89 Frost Street. DE 698-16 ¶ 2. In his affidavit, Mr. Goodman states that he worked for both Adchem and Lincoln and that:

> The Pufahl Brothers managed both Lincoln and Adchem. Joseph was the main boss and his brothers worked under him. Herman was the head engineer and maintenance person. Charles was involved in the operations. There [sic] roles were the same at both Lincoln and Adchem. There was little separation between the two companies. For example if I had employees out at 89 Frost, I could pull employees from the 625 Main facility if necessary, and vice versa. Employees routinely were transferred back and forth between the two facilities. Both Adchem and Lincoln had their offices at 89 Frost Street.

Id. ¶ 19.

In response, Defendants maintain that Mr. Goodman's affidavit does not state that employees were transferred between *Defendants* but rather that employees were transferred between the two *facilities*, i.e., 89 Frost Street and 625 Main Street. In this regard, Defendants point out that Mr Goodman later testified at his deposition that he only worked for Lincoln and never worked for Adchem and that the transfer of employees between 625 Main Street and 89 Frost Street were of *Lincoln* employees. DE 698, Ex. 16, at 66-70, 182-184. The Court finds the record sufficiently unclear on this point to raise a question of fact as to whether employees were transferred between Lincoln and Adchem. *See Moll v. Telesector Resources Group, Inc.*, 760 F.3d 198, 201 (2d Cir. 2014) ("Although a party cannot create a material issue of fact to defeat a motion for summary judgment by simply contradicting his earlier testimony, the "sham issue of

fact" doctrine does not mandate that the court disregard a non-party witness's subsequent testimony when it conflicts with the non-party witness's prior statement.").

Lastly, Plaintiffs contend that the Lessee Defendants were shell companies with no employees of their own and that Defendants shared personnel, including an accountant. It is undisputed that Lincoln employees performed administrative functions on behalf of Pufhal Realty and NSR Corp. because the latter two did not have any staff of their own. Similarly, there is no dispute that Lincoln employees performed administrative functions on behalf of Adchem for some time, including processing Adchem's bills and drawing a check on Adchem's separate bank account to pay those bills, answering phones, and bookkeeping. The parties, dispute, however, whether Pufhal Realty/NSR Corp. and Adchem compensated Lincoln for the use if its employees.

Given the murky record on these issues, together with the overlap in ownership, officers, directors, and personnel, the Court finds that this factor could weigh in favor of an alter ego finding.

e. Common Office Space, Address and Telephone Numbers

The record reflects that between 1966-1972, Defendants shared some office space at 89 Frost Street and that Lincoln and Adchem each manufactured at 625 Main Street. However, the record also reflects that Lincoln had a sign on 89 Frost identifying it as Lincoln's facility; Adchem had a sign identifying 625 Main as Adchem's facility; Lincoln and Adchem used locations that the other did not; all Defendants except NSR Corp. had separate phone numbers; and the rent for shared buildings was shared proportionally by Defendants based upon the amount of the building(s) used by each entity as determined by outside accountants. Although Plaintiffs dispute that the rent was shared, Plaintiffs proffer no evidence to support their

contention. *See Parker v. Sony Pictures Entm't Inc.*, 260 F.3d 100, 111 (2d Cir. 2001) ("A defendant need not prove a negative when it moves for summary judgment on an issue that the plaintiff must prove at trial. It need only point to an absence of proof on plaintiff's part, and, at that point, plaintiff must 'designate specific facts showing that there is a genuine issue for trial.'") (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). Moreover, Plaintiffs' submission that the central switchboard for Adchem was located at the 89 Frost Street Site and calls relating to Adchem would come in to that switchboard and get directed back over to 625 Main Street to be answered by the clerk or whoever was there, Pls.' Rule 56.1 Counter Stmt. ¶ 352, is immaterial. A shared switchboard is hardly probative of control. Accordingly, this factor does not support piercing the corporate veil. *See In re Adler*, 467 B.R. at 291 ("[I]n the case of closely-held corporations these facts [debtor was the sole owner, officer, employee and director of each of the corporations, and the corporations all operated out of the same office and had the same telephone and fax numbers] are not uncommon, and often create a scenario where a sole principal dominates corporate decision-making. As such, these facts are neutral in the context of closely-held corporations and are not enough to pierce the corporate veil.").

f. Business Discretion Displayed by Allegedly Dominated Entities

Plaintiffs cite no evidence that any Defendant's business decisions were impaired or influenced by another Defendant. Instead, Plaintiffs conclusorily state that "[e]ach individual Defendant had no independent business discretion, as all Defendants were controlled by the same three individuals: Charles Pufahl, Joseph Pufahl and Herman Pufahl. The Pufahl Brothers were the sole owners, directors and managers of all of the Defendants." DE 699 at 15. Plaintiffs' conclusion is contrary to well-established law that the complaining party must show *actual* domination and not just an "opportunity to exercise control." *De Jesus*, 87 F.3d at 69.

Given Plaintiffs' conclusory assertions on this factor and after the Court's review, the Court finds that this factor weighs against veil-piercing.

g. Whether Dominated Entity is Dealt with at Arm's Length

There is much evidence in the record that the parties' dealings were conducted at arm's length. For example, Plaintiffs admit that Defendants conducted separate businesses with separate products, processes, customers, and machinery. In that regard, it is uncontested that Lessee Defendants were in the business of leasing, owning and managing real estate, Lincoln bonded and laminated customer fabrics to various backing materials, and Adchem manufactured adhesives and adhesive tape. *See Fantazia Int'l v. CPL Furs N.Y., Inc.*, 20 Misc. 3d 1113(A) (Table, text in Westlaw), 2008 N.Y. Slip. Op. 51338, at *7 (Sup Ct. N.Y. Cnty. June 19, 2008) ("Evidence of defendants' arm's-length dealings is shown by each company's specific business function . . . ."), *aff'd in part, modified in part*, 67 A.D.3d 311 (1st Dep't 2009); *cf. Wm. Passalacqua Bldrs*, 933 F.2d at 140 (finding that "corporations did not deal at arms length with each other" where, *inter alia*, they "shuffled funds" from one to the other with no "demonstrated business purpose of the corporation that was the source of the funds"). In addition, it is undisputed that not only did Adchem sell water-based adhesives to Lincoln for use in Lincoln's fabric bonding operations, by 1966, Adchem also mixed and sold other types of adhesives to third parties outside the textile industry, including Pratt Paper, Angell Manufacturing, Ishmael Metal Decorating, Devon Tape, Mystic Tape, Tape Rite, Thursday Laminating, Prestige Label, and Acme Name Plate. Defs' Rule 56.1 Stmt. ¶ 319. It is further not disputed that the Defendants had separate bank accounts (though Plaintiffs contend that there is no evidence that Defendants had separate bank accounts for the entire relevant period from 1966 to 1976); each Defendant filed taxes separately and paid the taxes due on its earnings out of its own account;

and each Defendant had a separate federal tax identification number. Further, Plaintiffs admit that the Lessee Defendants profited from their subleases to Adchem and Lincoln, and invoiced Lincoln for rent in the same manner as they invoiced third parties.

In support of their argument that Defendants did not have arm's-length dealings, Plaintiffs present several arguments.[8] First, Plaintiffs argue that there is no evidence of the amount of profit from the sale of adhesives from Adchem to Lincoln. The 1969 Audit states that Adchem's prices to Lincoln were set by John Pufhal and quality control at Adchem. DE 698-19 at AA006841. There is no mention that these prices were not competitive. Morever, the only deposition testimony on this issue indicates that the price of adhesives was negotiated between Lincoln and Adchem based on pricing of Adchem's competitors, Adchem's price was competitive with these prices, and Adchem always charged Lincoln a mark-up. Plaintiffs have presented no evidence to the contrary and instead rely on their assertion that Adchem could not have profited because arms-length negotiations between the two companies was not possible. The Court has already found this argument to be without merit.

Next, Plaintiffs point out that the 1969 Audit revealed that intercompany transactions between Adchem and Lincoln were done without any purchase orders; transfers of chemicals between Adchem and Lincoln were done on a "very informal basis" with no records of shipments or receivables; intercompany transactions between Adchem and Lincoln were done without any purchase orders or receiving slips or records; and Lincoln picked up chemicals at Adchem "daily without the benefit of order, receiving slip or other record." Pls.' Rule 56.1 Counter Stmt. ¶¶ 195, 355, 370, 372. It is undisputed that by 1971, however, Adchem and Lincoln had fixed some

[8] To the extent Plaintiffs' arguments on this point have been addressed in the Court's discussion of other factors, the Court will not repeat them here.

of the deficiencies noted in the Audit by, for example, following the Audit's recommendation to maintain regular receiving and shipping records or devising an intercompany transfer form for adhesive sales. Defs.' Rule 56.1 Stmt. ¶ 417. While it may be that domination is not demonstrated solely by the fact that Defendants were "closely related corporations, the employees of which conduct[ed] their inter-company affairs with the informality that comes from constant association," *Coastal States Trading, Inc. v. Zenith Navigation S.A.*, 446 F. Supp. 330, 337 (S.D.N.Y. 1977), the Court does find that the lack of formality between Lincoln and Adchem from prior to 1969 or 1971 as set forth in the Audit may be probative of domination.

Lastly, Plaintiffs contend that Defendants routinely transferred equipment and assets between the various entities with no consideration. Specifically, Plaintiffs focus on two assignments: Adchem subleased 625 Main and 85 New York Ave from NSR Corp. (and later NSR Co.) until 1975, at which time Adchem was assigned the leases for those locations. Defs.' Rule 56.1 Stmt. ¶ 433. Plaintiff contend that these assignments reflect the common ownership and control the Pufahl Brothers exerted over the related Defendant entities.

First, with regard to 85 New York Avenue, it is undisputed that (1) Pufhal Realty, as tenant, leased 85 New York Avenue from the Spiegels on February 17, 1965; (2) in June 1971, after Pufhal Realty changed its name to NSR Corp., NSR Corp. subleased 85 New York Avenue to Adchem; and (3) NSR Corp. charged Adchem more in rent under the 1971 lease for 85 New York Avenue ($17,040.00 per year) than NSR Corp. was required to pay the Spiegels under the 1965 lease for the same property ($9,169.65). Defs.' Rule 56.1 Stmt. ¶¶ 285-87. Plaintiffs point out, however, that in 1975, the Lessee Defendants assigned the 85 New York Avenue lease to Adchem Corp. for no consideration and, at that point, Adchem received the favorable lease terms paid by NSR Corp., i.e., Adchem only had to pay $9,169 per year directly to the landlord (the

Spiegels) without paying NSR Corp. for this financial benefit. According to Plaintiffs, this resulted in a $7,871 per year benefit from 1975 until Adchem vacated the premises in 1984, and the total financial benefit to Adchem Corp. over the nine-year period was $70,839. *Id.* ¶¶ 287, 290.

Next, with regard to 625 Main Street, the Lessee Defendants leased 625 Main to Adchem from 1965 until 1975, when Lessee Defendants assigned the lease to Adchem for no consideration. *Id.* ¶ 433. Plaintiffs point out that prior to the 1975 assignment, Adchem paid the rent directly to the landlord on the behalf of Lessee Defendants, using checks from Adchem's separate checking account. *Id.* ¶¶ 447-48. In this regard, it is undisputed that Adchem was assigned the leases for 625 Main and 85 New York Ave. in 1975 because Spiegel did not approve of cashing checks from Adchem since the leases were in the Lessee Defendants' name. *Id.* ¶ 448. It is further undisputed that Spiegel Associates was sent a copy of the 1975 assignments of leases for 625 Main and 85 New York Ave. and returned them to Adchem with a demand that Adchem affix its corporate seal to the assignments and return them to Spiegel Associates. *Id.* ¶ 449.

In sum, while there is much about the parties' dealings which supports arm's-length dealings, Plaintiffs have raised some questions of fact on this issue. Thus, the Court finds that this factor could weigh in favor of an alter ego finding.

h. Whether Entities are Treated as Independent Profit Centers

It is undisputed that Defendants had separate bank accounts (although Plaintiffs note that the evidence does not cover every year of 1966-76); Defendants made separate tax filings and payments and had separate tax identification numbers; Defendants' separate tax filings and financials show separately-recorded profits for each Defendant; and Defendants' tax filings also

show Lincoln's business declined and began operating at a loss in the early 1970s, and no other Defendants shared these tax losses. In response, Plaintiffs merely assert that Defendants were not treated as independent profit centers because the Defendants retained the same attorney and accountants; Defendants used consolidated reports; and the 1969 Audit notes a lack of appropriate separation. DE 699 at 18. The Court finds that these contentions, which have already been addressed above, are not particularly relevant to this factor, especially given the overwhelming evidence that Defendants were treated independently in terms of profits. Accordingly, this factor weighs against an alter ego finding.

i. Payment or Guarantee of Dominated Entity's Debts by Others

Plaintiffs raise two new arguments under this factor. First, they note that in 1975, Lincoln changed the beneficiary and owner of certain term life insurance policies on Joseph Pufahl to Adchem and other such policies on the Pufahl Brothers to NSR Co. Defs.' Rule 56.1 ¶ 271. These changes were made pursuant to resolutions of Lincoln's Board of Directors and upon these changes, the recipient entities assumed payment of all premiums on the policies. *Id.* Moreover, neither Adchem nor NSR Co. received any proceeds from the life insurance policies because the policies lapsed before the death of any of the Pufahl Brothers. *Id.* ¶¶ 272-73. Thus, these changes do not support a finding of control or domination.

Next, Plaintiffs contend that when employees were traded back and forth between Lincoln and Adchem, the employees were paid with only one cash envelope, the method of payment did not change, and the person handing them the payment did not change. Pls.' Counter 56.1 ¶ 384. As noted above, the Court has already found that, based primarily on Goodman's affidavit and deposition testimony, there is a question of fact as to whether employees were transferred between Lincoln and Adchem. Plaintiffs again rely on Goodman's deposition where

he testified that when he "routinely pulled employees back and forth," the employees were paid at the end of the week with one cash envelope. DE 698, Ex. 16, at 14. Similarly, Lloyd Leary testified that he was paid in cash and the way he got paid did not change regardless of which facility he worked at, viz. 89 Frost or 625 Main. DE 698, Ex. 18, at 14-15, 45-46. Presumably, the implication Plaintiffs are trying to draw is that there was a blurring of lines between which Defendant entity – Lincoln or Adchem – was paying the employees. Although not particularly strong, the Court finds that this evidence could be probative of one entity paying the debts of the other. Thus, the Court finds that this factor could weigh, if ever so slightly, in favor of an alter ego finding.

j. Whether the Corporation in Question had Property that was Used by the Other Corporation as if it Were its Own

Plaintiffs argue that the fact that Lincoln changed the beneficiary and owner of certain term life insurance policies on the Pufahl Brothers to Adchem shows that Lincoln's property was used by Adchem. The Court has already rejected this contention. Similarly, Plaintiffs' contention that all Defendants signed settlement documents to a 1977 litigation between NSR Co. and Spiegel as lessees of 89 Frost Street is not particularly probative of this factor.

Lastly, Plaintiffs note that Adchem used the office space and conference room at 89 Frost Street as "if it were its own." DE 699 at 19. While it is undisputed that from 1966 to 1972 or 1973, Lincoln used the office space and a conference room at 89 Frost Street, Plaintiffs present no evidence to dispute Defendants' assertion that Adchem paid rent for its share of space. Accordingly, this factor weighs against a finding of alter ego liability.

k. Review of the Present Record

Based on the totality of the record, the Court finds that the evidence, viewed in the light most favorable to Plaintiffs, does not raise a genuine issue of material fact about whether

Defendants constituted a single enterprise under the control of the Pufhal Brothers. While a few factors may weigh in favor of a finding of domination,[9] these factors, even when considered together, are insufficient as a matter of law to establish the degree of domination necessary to disregard Defendants' separate identities in light of the overwhelming undisputed evidence of independence. Even assuming arguendo that Plaintiffs had proffered sufficient evidence to raise a material issue of genuine fact on the issue of domination, Plaintiffs' single enterprise claim would still fail as, for the reasons set forth below, Plaintiffs have not provided any triable evidence with regard to the second prong of the alter ego analysis, viz. causation.

2. Whether Domination Caused the Contamination

"Mere domination or control of the corporation is insufficient to permit a court to disregard the existence of the corporate entity." *Bedford Affiliates*, 156 F.3d at 431. As noted above, in CERCLA cases, the complaining party must also demonstrate that the "corporate domination caused the contamination at the Site." *Id.* at 432. Here, Plaintiffs failed to present evidence of the "required link" between the Pufhal Brothers' alleged domination and the Site contamination. *Rochester Gas & Elec. Corp. v. GPU, Inc.*, 355 F. App'x 547, 550 (2d Cir. 2009).

Plaintiffs have alleged, and Defendants have disputed, that Lincoln used and possibly released PCE in only three ways: (1) the use of PCE to clean machinery; (2) scouring fabric that contained residual PCE left by third parties; and (3) the operation of a dry cleaning machine containing PCE. Pls.' Rule 56.1 Counter Stmt. ¶ 253. Plaintiffs have not presented evidence of

[9] These factors include an overlap in ownership, officers, directors and personnel; the informal basis Adchem and Lincoln conducted sale transactions as noted in the 1969 Audit; and the evidence suggesting that at least some payments to Adchem/Lincoln employees were made in cash.

any other means by which Lincoln could have released PCE. *Id.* ¶ 254.[10] Here, Plaintiffs' alter ego claim fails because Plaintiffs have not shown any causal connection between any alleged domination and any of these alleged PCE releases. At best, Plaintiffs can allege that the Pufhal Brothers, acting in their capacities as Lincoln officers and directors, were involved in some corporate activity related to Lincoln's purported release of PCE at 89 Frost. However, "it cannot be enough to establish liability here that dual officers and directors made policy decisions and supervised activities [on behalf of Lincoln]. [Plaintiffs] would have to show that, despite the general presumption to the contrary, the officers and directors were acting in their capacities as [Adchem or Lessee Defendant] officers and directors [all under the control of the Pufhal Brothers as a single enterprise], and not as [Lincoln] officers and directors, when they committed those acts." *Bestfoods*, 524 U.S. at 69-70. Plaintiffs have made no such showing.

Citing to *Rochester Gas & Elec.* ("*RGE*"), 355 F. App'x 547 and *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 808 F. Supp. 2d 417, 499 (N.D.N.Y. 2011) ("*NYSEG I*"), *aff'd in part, vacated in part*, 766 F.3d 212 (2014) ("*NYSEG II*"), the entirety of Plaintiffs' argument on causation is as follows:

> Here, PCE pollution is inherent in dry cleaning operations utilized at the relevant time. Defendants' decision to use a dry cleaner at 89 Frost Street, and Defendants' decision to sublet 89 Frost Street to a polluting subtenant, were, in effect, decisions to pollute Plaintiffs' property.

DE 699 at 10. Even if this Court were to credit Plaintiffs' conclusory allegation that dry cleaning inevitably caused contamination (whether used by Lincoln or Marvex), Plaintiffs do not allege that any domination caused (1) Lincoln or Marvex's independent decision to install a dry cleaner;

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[10] Plaintiffs only dispute this contention on the grounds that Defendants also have liability as *de facto* owners, a contention already rejected by the Court.

or (2) the Lessee Defendants' sublease to Lincoln or Marvex. In fact, with regard to Marvex, it is undisputed that Marvex did not install its dry cleaner until at least the second year of its sublease. Pls.' Rule 56.1 Counter Stmt. ¶ 311.

Moreover, the cases cited by Plaintiffs are distinguishable. In *RGE*, the court found that the domination was so pervasive that the parent "controlled virtually every aspect of [its subsidiary] . . . [which] meant control over the daily operations of its subsidiary." *Rochester Gas & Elec. Corp. v. GPU, Inc.,* No. 00-CV-6369, 2008 WL 8912083, at *29 (W.D.N.Y. Aug. 8, 2008); *see also RGE*, 355 F. App'x at 550 (finding parent so dominated subsidiary that the "actions of [the subsidiary] were the actions of [the parent]"). In such situations, the corporations "become so inextricably confused that it is impossible or impracticable to identify the corporation that participated in the transaction attacked." *D. Klein & Son,* 147 F. App'x at 197.

Similarly, in *NYSEG I*, the court found that many corporate formalities were not honored during the relevant time period; subsidiaries were treated as "mere pockets" of the parent and had "very little business discretion"; funds were transferred between the parent and its subsidiaries at whim; and the companies did not deal with each other at arm's length. 808 F. Supp. 2d at 498-9; *see also NYSEG II*, 766 F.3d at 225 (affirming lower court's finding of complete domination as a result of, *inter alia*, the parent's "abuse of all its subsidiaries"). Given the extent of the domination, the court found it was impossible to distinguish the two companies, thus "establishing a 'direct nexus' between [the parent's] domination and the operation of the . . . facilities, which resulted in the contamination at issue." 808 F. Supp. 2d at 499.

Here, by contrast, the limited evidence supporting Plaintiffs' generalized single enterprise allegations do not show that any Defendant (particularly Adchem) controlled the day-to-day operations of any other Defendant (particularly Lincoln), which operations contributed to the

contamination. Because Plaintiffs present no evidence connecting corporate domination to the Site contamination, the Court finds that there is no genuine dispute of material fact and Plaintiffs' veil-piercing claims must be dismissed.

B. Plaintiff's Common Law Nuisance Claim is Time Barred

1. The Applicable 3-Year Limitations Period

Plaintiffs' fourth cause of action asserts a claim for common law nuisance. The statute of limitations for a public nuisance claim in an action to recover damages is set forth in N.Y. C.P.L.R. § 214-c and provides in pertinent part:

> [T]he three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.

N.Y. C.P.L.R. § 214-c(2).[11] "For purposes of C.P.L.R. § 214–c, a claim for a latent personal injury accrues 'when the injured party discovers the primary condition on which the claim is based.'" *Bano v. Union Carbide Corp.*, 361 F.3d 696, 709 (2d Cir. 2004) (quoting *In re N.Y. Cnty. DES Litig.*, 89 N.Y.2d 506, 509 (1997)); *see id.* ("Such a claim accrues when the plaintiff first discovers the property damage.").

Relying primarily on *Lessord v. GE Co.*, 258 F. Supp. 2d 209 (W.D.N.Y. 2002), Plaintiffs

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[11] The same accrual date arises as a result of CERCLA § 309. *See* 42 U.S.C. § 9658(a)(1), (b)(4) ("In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance . . . the . . . 'federally required commencement date' means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance . . . concerned.").

argue that their nuisance claim is timely because there are issues of fact as to when Plaintiffs knew the cause of the contamination, particularly the identities of the parties responsible for the contamination. Plaintiffs' argument misconstrues the law and ignores key facts.

In *Lessord*, the plaintiffs sought various relief in connection with the contamination of property owned by plaintiffs, which was alleged to have emanated from two sites owned by third parties via contaminants traveling by groundwater. *Id.* at 210-11. Plaintiffs "assert[ed] that prior to 1999, although they were aware generally that there was contamination in the area, they reasonably believed, based on the facts then available to them, that there was no significant contamination of their own property." *Id.* at 213. The court concluded that issues of fact existed concerning "when plaintiffs discovered, or reasonably should have discovered, both the injury at issue in their claims against the moving defendants, and the cause of that injury." *Id.* at 216.

Here, by contrast, Plaintiffs' claims concern PCE released *on their own property*, viz. 89 Frost Street – not up- or downgradient. Thus, this case is more like *Seneca Meadows, Inc. v. ECI Liquidating, Inc.*, 983 F. Supp. 360, 364 (W.D.N.Y. 1997), where the plaintiff, which owned and operated a landfill, sued a number of entities that had generated hazardous wastes that they disposed of at the landfill. *Id.* at 362. In holding that the plaintiff's state law claims were untimely, the court rejected the plaintiff's argument that the statute of limitations did not begin to run until the plaintiff knew exactly which contaminants had been discharged by which defendants. *Id.* at 364. Instead, the court found that "it is only necessary for plaintiff to know the fact of the contamination." *Id.* (citation and internal quotation marks omitted). The court further noted that it was also "not necessary for plaintiff to know the identity of all individuals responsible for the contamination before the statute of limitations begins to run. . . . Once [plaintiff] discovered both the injury and its cause, it was under an obligation to ascertain the

responsible parties and commence this action within the applicable statute of limitations." *Id.* Indeed, even the *Lessord* court distinguished *Seneca* by noting that *Seneca* "involved a single site that had been contaminated by wastes dumped directly at the site by known parties, all of which plaintiff had been aware of for ten years." 258 F. Supp. 2d at 218 n.9.

Here, Plaintiffs knew of the injury at the Site and had already accused Defendants, the Site's occupants, of causing the contamination many years ago. In this regard, Plaintiffs admit knowing in 1996 that the Frost Street Sites were listed on the Registry for soil and groundwater contamination. Pls.' Rule 56.1 Counter Stmt. §§ 161-68. At that time, they alleged that Defendants' occupancy of 89 Frost caused the contamination and demanded that Adchem "bear all costs and expenses" for the Site. *Id.* § 169. By 1997, Plaintiffs were informed of Defendants' various connections to the Site, and Marvex's PCE use and arson. *Id.* §§ 170-74. Plaintiffs' petitions to delist the Frost Street Sites from the Registry were denied in 1996-97, and their challenge of that denial failed with a 1998 court decision affirming NYSDEC's determination that "a consequential amount of hazardous waste had been disposed at the [Frost Street S]ites which presented a significant threat to the environment." *Id.* § 177. In March 2000, NYSDEC issued four Records of Decisions ("RODs") detailing the contamination (including PCE contamination) found at the Frost Street Sites and the remediation that would be required. Id. ¶ 181. The RODs included NYSDEC's response that the contamination "clearly originate[d] on the sites and are not from an upgradient source." *Id.* § 183. These events notified Plaintiffs of "the fact of the contamination" originating at the Frost Street Sites and started the limitations period.

In fact, in dismissing New York's public nuisance claim regarding the same Site (which is subject to the same limitations period), this Court held that the latest possible date on which

the statute began to run with regard to New York's claims was March 2000, when NYSDEC published the Frost Street Sites' RODs. *State of New York v. Next Millennium Realty*, No. CV-03-5985 (SJF), 2007 WL 2362144, at *16 (E.D.N.Y. Aug. 14, 2007), The Court's reasoning applies equally to Plaintiffs, who not only had knowledge of the RODs but submitted comments on NYSDEC's underlying investigation. Pls.' Rule 56.1 Counter Stmt. § 183.

In sum, the Court finds that there is ample evidence that Plaintiffs "discover[ed] the primary condition on which the[ir] claim is based," *Bano*, 361 F.3d at 709, well over three years prior to the date they commenced this lawsuit, i.e., November 24, 2003. Thus, any claim for damages arising under state public nuisance law is time barred.

2. The Two-Injury Rule

Plaintiffs also argue that the "two-injury" rule precludes dismissal of their public nuisance claim. "Under this rule, which evolved in the context of exposure-related medical problems but which has since been applied to toxic torts generally, where the statute of limitations has run on one injury, a later injury that is 'separate and distinct' from the first is still actionable under New York law. *Lessord*, 258 F. Supp. 2d at 220; *see also Suffolk Cnty. Water Auth. v. Dow Chem. Co.*, 121 A.D.3d 50, 59-60 (2d Dep't 2014). While the rule has been recognized by intermediate appellate courts in New York, it has never been recognized by the New York Court of Appeals. *See Suffolk Cnty. Water*, 121 A.D.3d at 60; *see also Snyman v. W.A. Baum Co.*, 360 F. App'x 251, 252 n.1 (2d Cir. 2010). As recently explained by the Second Department:

> The two-injury rule permits the splitting of one cause of action or recognizes the accrual of a new cause of action where a single exposure has resulted in separate and distinct injuries. Pursuant to the rule, the statute of limitations starts to run anew upon the discovery of a second injury caused by the same wrong, such as contamination spreading to a new site. However, the two-injury rule does not apply

> to an injury which is the outgrowth, maturation or complication of the original contamination. Rather, the second injury must be separate and distinct and arise independently of prior injuries, and must be "qualitatively different from that sustained earlier. The plaintiff bears the burden of coming forward with a factual substantiation of a new injury occurring within the period of limitations which was qualitatively different from that sustained earlier.

Suffolk Cnty Water, 121 A.D.3d at 60 (internal citations and quotation marks omitted).

Here, Plaintiffs contend that the "contamination of the ground water by PCE leaking from Defendant's use of a dry cleaner at 89 Frost Street is a separate and distinct injury from the act of arson committed by the Marvex foreman that released PCE. Plaintiffs did not discover that Defendants used a dry cleaning machine at 89 Frost Street until 2013 when Plaintiffs located and interviewed former employees of Defendants." DE 699 at 23. Plaintiffs' proffer fails as a matter of law, as Plaintiffs have failed to show a "separate and distinct" injury within the limitation period. Plaintiffs knew of the contamination of the Site as far back as 1996-2000, and they have not shown a distinct and timely injury resulting from the spread of contamination, *Suffolk Cnty Water*, 121 A.D.3d at 60, or new sources of contamination, *In re MTBE Prods. Liab. Litig.*, No. Master File 1:00-1898, 2007 WL 1601491, at *11 (S.D.N.Y. June 4, 2007). Instead, Plaintiffs rely on an injury (resulting from Defendants' use of a dry cleaner) that is directly traceable to the contamination Plaintiffs knew existed prior to the limitations period. Accordingly, the Court finds that the two-injury rule does not apply as a matter of law.

C. Plaintiff's Jury Demand

The parties do not dispute that a jury trial is unavailable for CERCLA claims. *See, e.g., Commerce Holding Co., Inc. v. Buckstone*, 749 F. Supp. 441, 447 (E.D.N.Y. 1990). Since the Court has dismissed Plaintiffs' sole non-CERCLA claim, the jury demand is hereby struck.

D. Plaintiffs' CERCLA ¶ 107 Claim

Plaintiffs seeks CERCLA damages pursuant to both section 107 and section 113. Defendants argue that Plaintiffs have no cognizable claim under section 107. The Court disagrees.

Under CERCLA, "private parties who engage in cleanup activity can recover costs associated with such actions by bringing claims under either section 107(a) or section 113(f) of CERCLA against 'potentially responsible parties' ('PRPs')." *NYSEG II*, 766 F.3d at 220. Under section 107(a), "a property owner or operator who has spent money on cleaning up hazardous waste may seek reimbursement for cleanup costs from other PRPs . . . limited to the 'necessary costs of response . . . consistent with the national contingency plan.'" *Id.* (quoting 42 U.S.C. § 9607(a)(4)(B)). Under section 113(f), "'[a]ny person may seek contribution from any other person who is liable or potentially liable under [section 107(a)] during or following any civil action under section 9606 of this title or under section 9607(a) of this title.'" *Id.* (quoting 42 U.S.C. § 9613(f)(1)). "In other words, a PRP who has been sued under section 107(a) to contribute to cleanup costs—even if it has not yet spent any money on cleanup activities—can seek contribution from other PRPs for cleanup costs, including from the initial plaintiff who sued the PRP under section 107(a)." *Id.*

In *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007), the Court noted that the remedies available in §§ 107(a) and 113(f) complement each other by providing causes of action "'to persons in different procedural circumstances.'" *Id.* at 139 (quoting *UGI Utils., Inc.*, 423 F.3d at 99). As explained by the Court:

> § 107(a) permits a PRP to recover only costs it has 'incurred' in cleaning up a site. [On the other hand, w]hen a party pays to satisfy a settlement agreement or a court judgment, it does not incur its own costs of response. Rather, it reimburses other parties for costs that

> those parties incurred . . . . Hence, a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a).

Id. at 139.

Here, Plaintiffs entered into three Consent Orders with the NYSDEC agreeing to remediate the 89 Frost Street Site. In addition, Plaintiffs have been sued by New York State under § 107 based upon, *inter alia*, the same alleged release that gives rise to their claims here. *State of New York v. Next Millenium*, No. 06-CV-1133 (E.D.N.Y. 2006). In the instant action, Plaintiffs claim they are not seeking to recover the same expenses under both § 107 and § 113. Rather, Plaintiffs maintain that their § 107 claims seek to recover costs that Plaintiffs voluntarily incurred by cleaning the soil and shallow groundwater *before* Plaintiffs executed the Consent Orders. In this regard, the Third Amended Complaint alleges that "[p]rior to the execution of the Consent Orders, Plaintiffs voluntarily incurred additional costs cleaning up the Frost Street Properties." Third Am. Compl. ¶ 5. Thus, Plaintiffs contend that these costs are separate and distinct from the involuntary costs Plaintiffs paid pursuant to the Consent Orders.

The Court finds that the parties' arguments and factual proffer on this point are lacking. Nonetheless, because Plaintiffs may have incurred costs beyond what the Consent Order requires and beyond what they could recover as contribution under § 113, the Court declines to dismiss Plaintiffs' § 107 claim at this juncture.

E. The Impact of the Release on the Current Litigation

The last point in Defendants' brief asserts that Plaintiffs' claims are barred pursuant to a release executed in 1977 between Plaintiffs' predecessor and Defendants in 1977. DE 698-1 at 30. Plaintiffs oppose Defendants' argument. DE 699 at 26. Neither side briefs the issue but instead refers the Court to their memoranda filed in their earlier summary judgment motion on

ths issue of owner liability.

Briefly, NSR Co. sued Spiegel after he unilaterally terminated the parties' lease following the 1976 fire on the Site. As part of the 1997 settlement of that dispute, Spiegel released Defendants from:

> all actions, causes of actions, suits . . . claims, and demands whatsoever, in law, admiralty or equity, which against [Defendants] the Releasor, the Releasor's heirs, executors, administrators, successors, or assigns ever had, [n]ow have, or hereafter can, shall or may have for, upon, or by reason of any cause, matter or thing whatsoever from the beginning of the world to the day of the date of this Release, arising out of and in connection with a certain lease dated April 1, 1966 made between JERRY SPIEGEL an landlord and PUFHAL REALTY CORP. as tenant . . including but not limited to a certain option granted to the tenant to purchase said property ... and with respect to [Northern State Realty Co. v. Jerry Spiegel].

DE 684-10 at 1-2. It is undisputed that Plaintiffs are successors-in-interest to Spiegel so that his obligations under the release run to Plaintiffs.

Citing *Olin Corp. v. Consol. Alum. Corp.*, 5 F.3d 10 (2d Cir. 1993), where the Second Circuit held that release provisions were sufficiently broad to encompass CERCLA liability notwithstanding the fact that the releases predated CERCLA, Defendants argue that the release here similarly encompasses Plaintiffs' CERCLA claims. In particular, Defendants note that the release releases all claims Plaintiffs "ever had, [n]ow have, or hereafter can, shall or may have for, upon, or by reason of any cause, matter or thing whatsoever." Plaintiffs disagree, arguing that the scope of the release is limited to claims "arising out of and in connection with" the lease and which existed "to the day of the date of" the release. Unlike the provisions at issue in *Olin*, the Court finds the release sufficiently ambiguous to warrant review of extrinsic evidence to ascertain the meaning intended by the parties. *See Int'l Multifoods Corp. v. Commercial Union*

Ins. Co., 309 F.3d 76, 83 (2d Cir. 2002) (setting forth New York law on contract interpretation).[12] Given the scant record before the Court on this motion, Defendants' motion for summary judgment on this issue is denied.

CONCLUSION

For the foregoing reasons, Defendants' motion for partial summary judgement is granted in part and denied in part.

SO ORDERED.

Dated: Central Islip, N.Y.
March 31, 2015

/s
ARLENE ROSARIO LINDSAY
United States Magistrate Judge

[12] It is undisputed that state law applies when interpreting agreements shifting CERCLA liability. *See Commander Oil*, 991 F.2d at 51.